No. 11,643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & CO., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE CO., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS FARGO BANK & UNION TRUST CO., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

On Petition for Review of Decision of the Tax Court of the United States.

REPLY BRIEF FOR PETITIONERS.

O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE,
Crocker First National Bank Building, San Francisco,
Attorneys for Petitioners.

Table of Authorities Cited

No. 11,643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLOOMFIELD RANCH, by JAMES A. CLAYTON & CO., a corporation, managing partner, operator and co-owner thereof, and by FLORENCE G. BALDWIN, JOHN DERROL CHACE, WILLIS SHERMAN CLAYTON, JR., ARTHUR D. CURTNER, JOHN KIRK DORRANCE, ROSE L. FITCH, MARGARET F. COYKENDALL, HUGH S. HERSMAN, ALFRED A. HAPGOOD, GEORGE H. OSEN, ALFRED L. PARKINSON, ESTATE OF ANDREW R. PATRICK, deceased, by SIGURD C. P. CORNETT, as executor of the will of Andrew R. Patrick, deceased, SAN JOSE HARDWARE CO., a corporation, NELLIE SHILLINGSBURG, ANNE THOMPSON, SARAH SHILLINGSBURG BARRY, MARGARET LEAMAN, and ESTATE OF ELLEN WEINSTEIN, deceased, by WELLS FARGO BANK & UNION TRUST CO., executor, substituted for Estate of Samuel Weinstein, deceased, by Ellen Weinstein, as executrix of the will of Samuel Weinstein, deceased, partners in and co-owners of Bloomfield Ranch,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

On Petition for Review of Decision of the Tax Court of the United States.

REPLY BRIEF FOR PETITIONERS.

In our opening brief we showed: That the title to the property that was acquired by the Investors was taken in the name of Thomas in whom a resulting trust arose leaving the equitable title in the Investors as tenants in common. That the Investors appointed Clayton as their agent to sell the property. That there being no intervening entity having any interest in the property, all moneys that were received from sales belonged directly to the Investors. That the Investors never organized in any way. That there was no semblance of an organization, consequently no resemblance to a corporation. That this case is governed by the *Gerstle* case (95 Fed. (2d) 587), from all of which it follows that the decision of the Tax Court must be reversed.

Respondent has not answered our opening brief.

We there showed conclusively that Thomas held the title in trust for the respective Investors, a resulting trust, not an express or an active trust, and that the Tax Court erred in holding that the titles were not held by Thomas in trust. (Our brief, page 23.) Respondent has made no attempt to answer that argument.

We further showed in our brief that since Thomas held only the naked, legal title, each Investor had a separate, equitable estate in the land, title to which was taken in the name of Thomas, with the result that the Investors were tenants in common, the equitable title to the land being real property. (Our brief, pages 24-29.) Respondent's only reply is, on page 23 of its brief, the bald assertion "* * * Inves-

tors here did not become co-owners as did members of the Gerstle Syndicate [95 Fed. (2d) 587] but acquired personal claims against the Operator; they had only the right to receive 'moneys remaining in the Operator's hands.'" That statement is directly contrary to the law and the facts as our brief shows, pages 26-29.

Respondent, on page 9 of its brief, refers to "Taxpayer's contention that it was merely a liquidating trust * * *", and elsewhere, pages 17, 18, refers to Taxpayer's claim that it was a trust. We made no such contention. Our brief does not anywhere refer to the transaction as one of liquidation, or as a trust of any kind other than a naked resulting trust, not an express trust, not an active trust, not the kind of trust that is taxable as a corporation.

We stated our position clearly on page 18 of our brief, as follows:

> "We contend that the petitioners were joint venturers, owners of undivided, equitable interests in real property, which they bought and placed in the name of Thomas. They were tenants in common and each individually and separately appointed Clayton his or her agent to sell his property, with such powers as were necessary to that end."

Respondent does not deny that Clayton was agent of the respective Investors. His brief mentions some of the agent's powers on page 19, but significantly omits, as did the Tax Court, in its opinion, the limitation on the powers of the agent.

> "But may not exchange, encumber, nor lease except as above specified, nor sell trees, wood or improvements off from said property without the consent of the Investors."

Another limitation of the purpose of the enterprise is stated in the agreements (Record, pages 167, 168):

> "The Operator is to take and hold title to said properties originally in the name of M. E. Thomas; * * * for the profitable resale thereof."

Because it could not, respondent has not pointed to any entity (such as a corporation would be) that held the real title (as distinguished from the shadow title) apart from the Investors. We showed in our brief, page 24, that the legal estate held by Thomas was nothing more than the "shadow" following the equitable estate held by the Investors. And we said, on page 32, "Thomas was merely a conduit of the title". Respondent evidently agrees with us, for he says, page 17 of respondent's brief, "Thomas was simply a depositary of the title; all powers were vested in the Operator". We showed, on pages 31-35 the limitations on the powers of the Operator.

Respondent says the taxpayer was organized for business purposes "by a group of Investors who jointly contributed capital to the enterprise and received the profits in proportion to their participating interests". There is not a line of evidence in the record that shows that the Investors were organized in any way, shape or form. The only inter-relationship between the Investors was the fact they each bought

undivided interests in the land. It is noteworthy that counsel has made no attempt to reply to our showing that, under the law of California, Thomas held the title in trust for each Investor separately. Consequently respondent's statement that the Investors did not become co-owners as did the members of the Gerstle Syndicate, but acquired personal claims against the Operator, results from plain disregard of the law. Counsel says, page 13, that the organization was created by "an agreement between the Operator, Clayton & Co., and fourteen Investors". We have pointed out in our brief that each Investor made a separate agreement individually with Clayton. There was no concert of action between the Investors, some of whom were not acquainted with the others.

The Court for the Fifth Circuit in *Commissioner v. Whitcomb,* 95 Fed. (2d) 596, in pointing out the difference between a group and an association, said, page 598:

> "An association which can be taxed as a corporation is organized with more permanency. It owns its property. Its managers are its agents. Its profits and losses are conceived of as its own, the associates as having ownership only in what may finally be distributed to them. A joint adventure is not such. In the Revenue Act of 1932, Section 1111 (a) (3) * * * syndicates and pools are expressly mentioned, and classed not as associations taxable as corporations, but with partnerships in which each individual pays his own tax."

The Revenue Act of 1932, in the respect quoted, has not been changed. It is interesting to note, in this connection, that respondent makes no attempt to distinguish *C. H. Cloris*, 32 B.T.A. 646, cited and quoted on pages 39 and 40 of our brief; *Commissioner v. Rector & Davidson*, C.C.A. 5, 1940, 111 Fed. (2d) 332, cited and quoted on pages 40 and 41 of our brief; *McKean v. Scofield*, C.C.A. 5, 1940, 108 Fed. (2d) 764, cited and quoted on pages 41 and 42 of our brief; and *C. A. Everts, et al. v. Commissioner*, 38 B.T.A. 1039, cited and quoted on pages 42 and 43 of our brief; all showing that there must be an organization if it is to result in an association. That the Investors had interests in the same properties certainly falls far short of making an *organization* of the Investors, as is shown by the authorities just referred to. It goes no further than making them tenants in common, which is exactly the situation that existed in the *Gerstle* case. Indeed our friends on the other side try to distinguish the *Gerstle* case from the case at bar (their brief page 23) on the ground (among others) that there the participants had equitable interests in the land.

The importance to respondent of establishing the existence of an organization among the Investors is evidenced by the frequent use of the word "organization" in its brief, where it appears more than a dozen times. We think that we have covered the subject of "organization" in our opening brief, pages 18-20. There was no organization here. Moreover, if there were an organization there is still lacking resemblance to a corporation.

The suggestion that the interests of the original Investors were transferable adds nothing to the argument, because the interests of the Investors were transferable as soon as they were purchased, and were not made so by any agreement that was made, being vested interests in real property, which must vest somewhere after the death of an owner. That happens under any of the groups defined as "partnerships". Ready transferability, like that of corporate shares, was not a characteristic of the interests of the petitioners.

Wellston Hills Syndicate Fund v. Commissioner, 101 Fed. (2d) 924, C.C.A. 8, cited by respondent, presents no new guiding principle; there all the parties signed one agreement, the title was in a corporation and distributions were made at its discretion contrary to the situation here. Besides, the form of the organization (for there was one there) was very similar to that of a business corporation. The Court thought the characteristics fitted like a glove (page 927).

Respondent has referred here and there to income received by the Investors. The Tax Court found that the reasons for renting and cultivating the acreage pending sales were two-fold; to carry the taxes on the property and to keep the property from going "native", i.e., becoming overgrown with weeds and brush. (R. page 217.) Also, that during the ten years, from 1930 to 1940, the only sales were sales of 60 acres for rights-of-way for public services, and but for such sales no sales would have been made in most of the years. (R. page 217.) The Investors paid income taxes

on whatever they received, and they think, particularly in view of the fact that they reported their income for years as advised by the Collector (though of course there is no estoppel), that they should not be taxed again. We submit that the *Gerstle* case is conclusive.

The decision of the Tax Court should be reversed.

Dated, San Francisco.
October 24, 1947.

Respectfully submitted,
O. K. Cushing,
Eustace Cullinan,
Delger Trowbridge,
Attorneys for Petitioners.